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In The
Supreme Court of the United States
October Term, 1997

CORNELIA WHITNER, ... *Petitioner*,
vs.
STATE OF SOUTH CAROLINA, ... *Respondent*.

MALISSA ANN CRAWLEY, ... *Petitioner*,
vs.
MICHAEL MOORE, as Director of the South Carolina Department of Corrections, ... *Respondent*.

On Petition for Writ of Certiorari
To the South Carolina Supreme Court

BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI

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PETITIONERS' QUESTION PRESENTED

Whether the South Carolina Supreme Court's unprecedented and unforeseeable decision reinterpreting the state's criminal child endangerment statute to expand the definition of "child" in "legal custody" to include a viable fetus violates the Fourteenth Amendment's requirement of due process notice and its prohibition against vague criminal statutes?

RESPONDENTS' COUNTER-STATEMENT OF THE QUESTIONS PRESENTED

1. Does this Court lack jurisdiction to review Petitioner Crawley's claims that the Respondents violated her constitutional rights, where the sole issue preserved for review concerned a question of state law?

2. Do the various interpretations of child abuse and drug abuse laws by the several states justify certiorari review, where those decisions turned on interpretations of state law rather than federal constitutional grounds?

3. Do the Petitioners' convictions satisfy due process requirements, where previous decisions of the state supreme court gave adequate notice that a viable fetus was a person protected by the unlawful neglect statute?

4. Does the potential prosecution for other unspecified conduct require certiorari review, where the statute clearly proscribes the Petitioners' conduct, and the burden of proof minimizes the danger of unwarranted applications of the statute?

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On Petition for Writ of Certiorari
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The Respondents submit that this Court should deny and dismiss the petition to review the judgments of the South Carolina Supreme Court.

CITATIONS TO OPINIONS BELOW

The South Carolina Supreme Court's opinion in Petitioner Whitner's case is dated October 27, 1997, and

reported at ___ S.C. ___, 492 S.E.2d 777 (1997).[1] The state supreme court denied the petition for rehearing from that decision on November 19, 1997.

The state supreme court issued an unpublished opinion in Petitioner Crawley's case on December 1, 1997. *Malissa Ann Crawley v. Parker Evatt*, Op. No. 97-MO-117 (S.C. Sup. Ct. filed Dec. 1, 1997). *See* PET. APP. at 89a-90a. The justices denied the petition for rehearing from that decision on January 8, 1998.

JURISDICTION

The Petitioners invoke this Court's jurisdiction pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the following:

1. The Fourteenth Amendment to the United States Constitution, which states in pertinent part:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any

[1] The South Carolina Supreme Court issued its original opinion on July 15, 1996. *See* Petitioner's Appendix ["PET. APP."] at 28a. The state supreme court granted Petitioner Whitner's petition for rehearing from that decision, and issued its amended opinion on October 27, 1997.

state deprive any person of life, liberty, or property, without due process of law....

2. S.C. CODE ANN. § 20-7-30(1) (1985), which states:

> When used in this chapter and unless otherwise defined or the specific context indicates otherwise:... "Child" means a person under the age of eighteen.

3. S.C. CODE ANN. § 20-7-50 (1985), which stated:

> Any person having the legal custody of any child or helpless person, who shall, without legal excuse, refuse or neglect to provide, as defined in § 20-7-490, the proper care and attention for such child or helpless person, so that the life, health or comfort of such child or helpless person is endangered or is likely to be endangered, shall be guilty of a misdemeanor and shall be punished within the discretion of the circuit court.

STATEMENT OF THE CASE

A. *PROCEDURAL HISTORY.*

(1) *Petitioner Whitner's Case.*

On February 6, 1992, the City of Easley, South Carolina arrested Petitioner Whitner for a violation of S.C.

Code Ann. § 20-7-50 (1985)[2] styled "unlawful neglect of a child." The Pickens County Grand Jury indicted Petitioner Whitner on April 7, 1992 for the same offense, and she pled guilty to "unlawful neglect of a child" on April 20, 1992. The Honorable Frank Eppes then sentenced Petitioner Whitner to eight years imprisonment. No objections were made to the charge or jurisdiction of the court, and Petitioner Whitner did not appeal her conviction or sentence.

On May 10, 1993, Petitioner Whitner filed a state post-conviction relief application. The Honorable Larry R. Patterson held a hearing on November 1, 1993, and issued an order vacating the convictions on November 22, 1993.

The State appealed Judge Patterson's order. Following briefing and oral argument, the South Carolina Supreme Court reversed the granting of post-conviction relief on July 15, 1996. The state supreme court later granted Petitioner Whitner's petition for rehearing and issued an amended opinion on October 27, 1997. The state supreme court denied rehearing from that opinion on November 19, 1997.

(2) *Petitioner Crawley's Case.*

On November 29, 1991, the City of Anderson, South Carolina arrested Petitioner Crawley for a violation of S.C. CODE ANN. § 20-7-50 (1985) styled "unlawful neglect of a child." Petitioner Crawley waived grand jury presentment and pled guilty as charged on January 6, 1992. The Honorable Tom J. Ervin then sentenced Petitioner Crawley to five years imprisonment, suspended during five years

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[2] The State charged the Petitioners under this version of the statute. The South Carolina General Assembly designated the crime a felony in 1993, and omitted the reference to "helpless persons" in 1996.

probation. She did not appeal her conviction or sentence.

On August 5, 1994, Judge Frank Eppes revoked Petitioner Crawley's probation and reinstated the active sentence based upon her July 15, 1994 conviction for criminal domestic violence. She did not appeal her revocation.

On September 25, 1994, Petitioner Crawley filed a state petition for writ of habeas corpus. The Honorable H. Dean Hall granted the writ on September 30, 1994, and set a hearing on the merits for October 17, 1994. At the conclusion of the merits hearing, Judge Frank Eppes issued a formal written order vacating Petitioner Crawley's conviction and sentence.

The State appealed Judge Eppes' order. On December 1, 1997, the state supreme court reversed the granting of state habeas relief, and reinstated Petitioner Crawley's conviction and sentence. The state supreme court denied her petition for rehearing on January 8, 1998. On February 27, 1998, Chief Justice Rehnquist denied Petitioner Crawley's request to remain on bond during the pendency of her appeal to this Court.

B. *STATEMENT OF RELEVANT FACTS.*

(1) *Petitioner Whitner's Case.*

Petitioner Whitner gave birth to a son, Kevin Sean, at the Easley Baptist Medical Center on February 2, 1992. The hospital tested the victim's blood, which showed the presence of the illegal substance of cocaine in his bloodstream.

(2) *Petitioner Crawley's Case.*

Petitioner Crawley gave birth to a son, Antwon Lorenzo, at Anderson Memorial Hospital on November 9, 1991. Both Petitioner Crawley and the victim tested positive for the presence of the illegal substance of cocaine in the bloodstream. Petitioner Crawley later admitted to the arresting officer that she unlawfully used cocaine during her pregnancy.

HOW THE QUESTIONS WERE RAISED BELOW

A. *PETITIONER WHITNER'S CASE.*

Petitioner Whitner's post-conviction relief application alleged that the State was holding her in custody unlawfully because:

(1) [She] entered a plea of guilty to a crime that does not exist in South Carolina...

> [She] was indicted for child abuse for giving birth to a child who had cocaine in his system. [She is] now informed that the statute under which [she] was indicted and plead guilty does not apply to a fetus.... PET. APP. at 58a-59a;

(2) The indictment and facts upon which [she] plead guilty does not allege a crime. To allow a conviction upon an indictment and facts that do not allege a crime is a violation of Article I, § 3 of the Constitution of the State of South Carolina and the Fourteenth

> Amendment to the Constitution of the United States of America...
>
> A person can only be imprisoned for a crime. As to the facts under which I entered a plea of guilty do not constitute a crime, I am being unlawfully held in prison.... PET. APP. at 58a-59a.

(3) [She] was denied effective assistance of counsel in that I plead guilty to a crime that does not exist...

> [Her] attorney failed to adequately research the question as to whether taking drugs while pregnant was a violation of South Carolina Code of Laws § 20-7-50. PET. APP. at 58a-59a.

On November 22, 1993, Judge Patterson ruled that the sentencing court lacked subject matter jurisdiction to accept Petitioner Whitner's plea because "the crime for which [she] was charged does not exist in South Carolina." PET. APP. at 67a. Judge Patterson further ruled that plea counsel was ineffective because she "did not challenge application of § 20-7-50 to these facts." PET. APP. at 68a.

On writ of certiorari, the Supreme Court of South Carolina reversed the granting of post-conviction relief. The supreme court ruled that a viable fetus was a "person" under state law and entitled to protection under the unlawful neglect statute. *Cornelia Whitner v. State*, Op. No. 24468 (S.C. Sup. Ct. filed July 15, 1996) ("Whitner I"), *reproduced* in PET. APP. at 28a-35a.

On petition for rehearing, the state supreme court addressed Petitioner Whitner's federal constitutional claims.[3] The amended opinion rejected her argument that she lacked notice that the statute proscribed prenatal exposure to cocaine. *Whitner v. State*, ___ S.C. ___, 492 S.E.2d 777, 784-85 (1997) ("Whitner II"). The state supreme court then rejected her argument that the interpretation of the statute was void for vagueness.[4] *Id.*, 492 S.E.2d at 785.

B. *PETITIONER CRAWLEY'S CASE.*

Petitioner Crawley's state habeas corpus petition alleged that her confinement was unlawful for the following reason:

> The Petitioner believes that she is being held unlawfully due to the fact that the act to which she pled guilty is not a crime in the State of South Carolina. As a result, the trial court did not have jurisdiction to either accept her plea or to revoke her probation. As the charge against her, based upon the act she is alleged to have committed, is not a crime within the State of South Carolina, she is

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[3] The state supreme court initially refused to consider these claims because Judge Patterson's order did not address the issues. *See* PET. APP. at 43a-44a; PET. APP. at 64a-69a.

[4] The state supreme court also rejected Petitioner Whitner's argument that the statute as applied violated her right to privacy. Id., 492 S.E.2d at 785-86. The Petitioners now state that the statute may implicate this right and others, but "this Court need not reach these issues in this case..." in determining whether to review the judgments below. *Petition for a Writ of Certiorari* ["PET."] pp. 28-29. Accordingly, the Petitioners have waived these arguments for certiorari review by this Court.

> being held in violation of the due process clause of Article I, § 3 of the Constitution of the State of South Carolina and the Fourteenth Amendment of the Constitution of the United States of America. PET. APP. at 85a.

In vacating the conviction, Judge Eppes noted that the Petitioner "contends she is being held unlawfully in violation of the due process clause...." PET. APP. at 86a. However, in addressing the merits of the petition, Judge Eppes held that "The sole question for the court is whether the petitioner pled guilty to a crime that does not exist in South Carolina." PET. APP. at 87a. Judge Eppes held that since "all other circuit court [sic] that have addressed the issue have resolved the issue in favor of the petitioner, this court feels that it must also grant the relief requested." PET. APP. at 87a.

On direct appeal, the Supreme Court of South Carolina allowed Petitioner Crawley to hold the time limits for filing her initial brief in abeyance while the decision in Petitioner Whitner's case was pending. After the state supreme court issued *Whitner* I, Petitioner Crawley filed a brief raising a number of constitutional issues, but avoiding the jurisdictional questions. On reply, the State argued that the federal constitutional claims were procedurally barred because neither the habeas petition nor Judge Eppes' order addressed these arguments.

After reviewing the record and appellate briefs, the Supreme Court of South Carolina decided the case without oral argument. The December 1, 1997 order simply states:

> The State has filed an appeal following the grant of respondent's petition for a writ of habeas corpus. We reverse the grant of habeas corpus and reinstate respondent's

conviction for unlawful neglect of a child. *Whitner v. State*, Op. No. 24468 (S.C. Sup. Ct. Refiled October 27, 1997) (Davis Adv. Sh. No. 30 at 27); S.C. CODE ANN. § 20-7-50 (Supp. 1995). PET. APP. at 90a.

REASONS FOR DENYING THE WRIT

A. There is no conflict among the states concerning the application of child abuse laws to viable fetuses because the cases from other jurisdictions turn upon an interpretation of legislative intent.

The Petitioners urge this Court to grant certiorari review because the South Carolina Supreme Court's interpretation of state law "directly conflicts with the decisions of its sister state courts." PET. pp. 12-13. This statement is not only misleading, but misrepresents the basis for the other decisions which prohibited prosecutions for prenatal abuse of a fetus.[5]

Three of the reported cases cited by the Petitioners concerned whether the use of drugs by a pregnant woman

[5] Based upon Petitioner Crawley's procedural default set forth in Respondents' Question 1 and argument D, arguments (A), (B) and (C) properly apply to Petitioner Whitner. However, if this Court determines that Petitioner Crawley is properly before it, then the arguments on the merits also apply to her constitutional claims and should not be deemed waived by the Respondents.

constituted a "delivery" to the viable fetus under those states' drug laws. *State v. Luster*, 204 Ga.App. 156, 419 S.E.2d 32 (1992); *People v. Hardy*, 188 Mich.App. 305, 469 N.W.2d 50 (1991); *Johnson v. State*, 602 So.2d 1288 (Fla. 1992). A quartet of state appellate courts concluded that the legislature did not intend their child abuse statutes to protect viable fetuses from prenatal exposure to drugs. However, nothing prevented lawmakers from doing so. *State v. Gray*, 62 Ohio St.3d 514, 516, 584 N.E.2d 710, 711 (1992); *State v. Dunn*, 82 Wash.App. 122, 128-29, 916 P.2d 952, 955 (1996); *Sheriff v. Encoe*, 110 Nev. 1317, 1321-22, 885 P.2d 596, 598 (1994); *Reinesto v. Superior Court*, 182 Ariz. 190, 192-93, 894 P.2d 733, 735-36 (Ct. App. 1995). Unlike South Carolina, two of the cited jurisdictions do not extend their homicide laws to protect a viable fetus, thereby precluding a similar extension to child abuse laws. *See Commonwealth v. Welch*, 864 S.W.2d 280, 281 (Ky. 1993); *Reyes v. Superior Court*, 75 Cal.App.3d 214, 217, 141 Cal.Rptr. 912 (1977). Finally, Texas has construed its child abuse law and held that it did not criminalize an injury which did not manifest itself until after the child was born. *State v. Collins*, 890 S.W.2d 893 (Tex. Ct. App. 1994). Like Kentucky and California, Texas penal law "has specifically limited the application of [its] penal laws to conduct committed against a human being who has been born and is alive." *Id.*, 890 S.W.2d at 897-98.

A plain reading of the reported decisions shows the other appellate courts based their rulings on an interpretation of state law and legislative intent. Importantly, none of these decisions categorically rejected or prohibited the legislature's power to criminalize the conduct for which the

Petitioners were prosecuted.[6] Instead, the courts concluded that the legislature did not intend the result sought by prosecutors under state law.

The South Carolina Supreme Court has reached the opposite conclusion regarding the legislative intent of this state's unlawful neglect statute.[7] The correctness of the state supreme court's interpretation of the statute cannot be reviewed in this Court. "We are, of course, bound to accept the interpretation of [South Carolina] law by the highest court of the State." *Hortonville Joint School Dist. v. Hortonville Educ. Ass'n*, 426 U.S. 482, 488 (1976).[8] Conversely, the other jurisdictions have interpreted their child abuse and drug laws as a matter of state law. If the other states choose not to prosecute under their respective laws, those decisions do not create a federal constitutional issue. *Cf. Martin v. Ohio*, 480 U.S. 228, 236 (1987) [Although majority of states did not require proof of self-

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[6] Those state courts addressing the issues of notice and vagueness did so because they concluded that prior state law did not support the interpretation urged by prosecutors. As shown *infra* in Argument B, the Petitioners had ample notice that their conduct was encompassed by this state's unlawful neglect statute.

[7] The Petitioners heavily rely upon past legislative history as an indication of the General Assembly's intent. PET. pp. 9-10. It is noteworthy that, in the two years following *Whitner* I, the legislature has not amended the statute to correct the state supreme court's alleged misinterpretation.

[8] The Petitioners have argued that the State's policy "will endanger both fetal and maternal health by frightening women away from prenatal and other needed care." PET. p. 10. This argument concerns the propriety of the punishment, and is properly a legislative policy question rather than a judicial concern. *McCleskey v. Kemp*, 481 U.S. 279, 319 (1987).

defense by a preponderance of the evidence, the states imposing that requirement did not violate due process].

The issue whether the Constitution allows South Carolina to prosecute the Petitioners for their violation of state law is a separate and distinct inquiry. Therefore, since there is no conflict between the states in the application of **federal** constitutional law, this Court should not grant certiorari review on this basis.

B. The Petitioners' convictions satisfy due process requirements because the previous decisions of the state supreme court gave them adequate notice that a viable fetus was protected by the unlawful neglect statute.

The Petitioners assert they could not have foreseen that the reference to a "child" in the unlawful neglect statute included an unborn, viable fetus. Accordingly, they conclude that they had no notice that the statute prohibited their ingestion of cocaine while pregnant. PET. pp. 17-20. These arguments have no merit. The prior decisions of the state supreme court gave the Petitioners ample notice that a viable fetus was a protected "person" under state civil and criminal law. Therefore, they were on notice that the unlawful neglect statute encompassed the conduct for which they were prosecuted.

The Respondent first notes that both Petitioners pled guilty. The voluntariness of their guilty plea is not the

subject of this petition for review.[9] Accordingly, the Petitioners have waived any claim that they lacked notice their conduct was prohibited by section 20-7-50. *See McCarthy v. United States*, 394 U.S. 459, 466 (1969) ["[A] guilty plea is an admission of all the elements of a formal criminal charge...]. However, even if this Court determines that the Petitioners' constitutional arguments are proper, certiorari review is not warranted.

This Court has held that the unforeseeable enlargement of a criminal statute deprives a defendant due process of law where she has no notice that her conduct was criminal. *See*, e.g., *Bouie v. City of Columbia*, 378 U.S. 347 (1964). When the statutory language is clarified by judicial interpretation, "due process bars courts from applying a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope." *United States v. Lanier*, ___ U.S. ___, 117 S.Ct. 1219, 1225, 137 L.Ed.2d 432, 443 (1997). The central inquiry "is whether the statute, either standing alone or as construed, makes it reasonably clear at the relevant time that the defendant's conduct was criminal." *Id.*

This Court has recognized that a broadly worded statute may encompass specific conduct without violating due process notice requirements. "[G]eneral statements of the law are not inherently incapable of giving fair and clear warning, and in other instances a general constitutional rule already identified in the decisional law may apply with

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[9] At the state post-conviction relief hearing, Petitioner Whitner alleged that her plea counsel was ineffective. The state supreme court reversed the granting of relief on this ground. *Whitner* II, *Id.*, 492 S.E.2d at 784. Petitioner Whitner has not renewed this issue on writ of certiorari to this Court.

obvious clarity to the specific conduct in question, even though 'the very action in question has [not] been held unlawful.'" *Lanier*, *Id.*, 117 S.Ct. at 1227, 137 L.Ed.2d at 446. Prior precedents of the state courts explaining the meaning of a statute are appropriate in determining whether the defendant had notice that her conduct was prohibited. *Cf. Wainwright v. Stone*, 414 U.S. 21, 22-23 (1973). Accordingly, in determining whether the Petitioners had adequate notice that section 20-7-50 applied to their conduct, this Court should consider the case law relied upon by the state supreme court. *See Whitner* II, *Id.*, 492 S.E.2d at 779-80.

In 1960, the state supreme court first held that a viable fetus was a "person" under state law in *Hall v. Murphy*, 236 S.C. 257, 113 S.E.2d 790 (1960). In that case, the defendant was the driver of a car which collided with a bus, causing his passenger to give birth prematurely. The child died four hours later. The record showed that the victim was a viable fetus.[10] As the administrator of the child's estate, the plaintiff brought a survival action for damages for the "pain and suffering" of the viable fetus. *Id.*, 236 S.C. at 259, 113 S.E.2d at 791.

On appeal, the defendant argued that a viable fetus was not a "person" within the purview of the survival statute[11] because a viable fetus was not a "separate being

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[10] This Court has ruled that a fetus is "viable" if "there is a reasonable likelihood of the fetus' sustained survival outside the womb, with or without artificial support." *Colautti v. Franklin*, 439 U.S. 379, 388 (1979).

[11] 1952 S.C. Code § 10-209 then read as follows:

apart from the mother." *Whitner* II, *Id.*, 492 S.E.2d at 780 [Explaining *Hall*]. After construing the statute, Justice Oxner disagreed. Speaking for a unanimous court, Justice Oxner stated that precluding a survival action for prenatal injuries to a viable fetus was "unsound, illogical and unjust." *Hall*, 236 S.C. at 262, 113 S.E.2d at 793. The court concluded, "We have no difficulty in concluding that a foetus having reached that period of prenatal maturity where it is capable of independent life apart from its mother is a person and if such a child is injured, it may after birth maintain an action for such injuries." *Id.*, 236 S.C at 263, 113 S.E.2d at 793. Importantly, the opinion noted with approval that "the law recognizes the separate existence of an unborn child for the purpose of protecting his property rights **and to protect him against criminal conduct.**" (Emphasis added). *Id.*, 236 S.C. at 262, 113 S.E.2d at 793, *quoting Amann v. Faidy*, 415 Ill. 422, 114 N.E.2d 412 (1953).

The state supreme court next addressed the rights of a viable fetus in the context of the wrongful death statute[12]

> Causes of action for and in respect to any and all injuries and trespasses to and upon real estate and any and all injuries to **the person** or to personal property shall survive both to and against the person or real representative, as the case may be, of a deceased person and the legal representative of an insolvent person or defunct or insolvent corporation, any law or rule to the contrary notwithstanding. (Emphasis added). *Now codified as* S.C. CODE ANN. § 15-5-90 (1977).

[12] The pertinent part of 1962 S.C. Code § 10-1951 then read:

> Whenever the death of a **person** shall be caused by the wrongful act, neglect or default of another and the act, neglect or default is such as would, if death had not

in *Fowler v. Woodward*, 244 S.C. 608, 138 S.E.2d 42 (1964). In that case, an automobile accident killed a woman who was eight months pregnant. When the plaintiff filed suit on behalf of the deceased infant's estate, the defendant moved to dismiss because there was no allegation that "the infant 'was born alive and thereafter died as a result of the actions and injuries alleged and complained of.'" *Id.*, 244 S.C. at 611, 138 S.E.2d at 43. The state supreme court disagreed.

Applying *Hall*, Justice Brailsford concluded that the plain language of the wrongful death statute allowed an action on behalf of the estate of a viable fetus:

> **Since a viable child is a person before separation from the body of its mother** and since prenatal injuries tortiously inflicted on such a child are actionable, it is apparent that the complaint alleges such an 'act, neglect or default' by the defendant, to the injury of the child, as would have entitled to child 'to maintain an action and recover damages in respect thereof... if death had not ensued.' By the very terms of the statute, this is the test of the right of an administrator to maintain an action for wrongful death. (Emphasis added). *Fowler*, 244 S.C. at 613, 138 S.E.2d at 45.

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ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, the person who would have been liable, if death had not ensued, shall be liable to an action for damages, notwithstanding the death **of the person** injured.... (Emphasis added). *Now codified as* S.C. CODE ANN. § 15-51-10 (1977).

Accordingly, the unanimous court rejected that argument "that in the absence of a live birth, 'no rights vested, supporting either a cause of action, or the appointment of an administrator.'" *Id.*, 244 S.C. at 615, 138 S.E.2d at 45.

Consistent with *Hall* and *Fowler*, the state supreme court logically concluded that a viable fetus was protected by the criminal law of this state in *State v. Horne*, 282 S.C. 444, 319 S.E.2d 703 (1984). In that case, the defendant stabbed his pregnant wife in the abdomen. During an emergency caesarean section operation, the unborn child died in the womb. The State charged the defendant with murder, and the jury convicted him of voluntary manslaughter.

On appeal, the state supreme court held that the language of the murder statute[13] allowed a prosecution for the unlawful killing of a viable fetus. Acting Justice Shaw noted that "It would be grossly inconsistent for us to construe a viable fetus as a 'person' for the purposes of imposing civil liability while refusing to give it a similar classification in the criminal context." *Horne*, 282 S.C. at 447, 319 S.E.2d at 704.

After reviewing those precedents, the state supreme court concluded that Petitioner Whitner had notice that her unborn, viable fetus was a "child" protected by section 20-7-50.[14] Under state law, "there is a basic presumption that

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[13] State law defines murder as "the killing of **any person** with malice aforethought, either express or implied." (Emphasis added). S.C. CODE ANN. § 16-3-10 (1985).

[14] The Petitioners state that the lower courts of this state have "rejected the interpretation recently propounded by the South Carolina Supreme Court, holding that such an interpretation is not consonant with the ordinary understanding of the term 'child.'" PET. pp. 19-20. Again, this statement is misleading. Obviously, a significant number of circuit

the legislature has knowledge of previous legislation as well as of judicial decisions construing that legislation when later statutes are enacted concerning related subjects." *Whitner* II, Id., 492 S.E.2d at 779. As the state supreme court noted, state law defines "child" as "a **person** under the age of eighteen." S.C. Code Ann. § 20-7-30(1) (1985). *See Whitner* II, *Id.*, 492 S.E.2d at 779. Accordingly, although the legislature did not expressly state that a child in section 20-7-50 included a viable fetus, the ordinary meaning of "person" under state law brings a viable fetus under its purview. Therefore, based upon *Hall*, *Fowler* and *Horne*, the Petitioners were on notice that their conduct violated the statute.[15] *Whitner* II, *Id.*, 492 S.E.2d at 780.

This interpretation of the statute was fully with due process guarantees. Unlike the defendants charged in *Bouie*, the state supreme court's interpretation of the statute was fully consistent with prior precedents of this jurisdiction.[16]

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judges accepted the state supreme court's interpretation because they accepted the guilty pleas of these and other defendants charged under the statutes.

[15] The State did not prosecute the Petitioners for this crime based upon either their status as cocaine addicts or pregnant women. *See* PET. p. 21. Rather, based upon the prior precedents of the state supreme court, the Petitioners were charged because their illegal use of cocaine harmed viable fetuses with recognized civil rights in this state.

[16] The Petitioners claim they had no notice they could be prosecuted because the earlier state law cases involved third parties who harmed the viable fetus. PET. p. 21. This distinction is without substance. First, none of the precedents made the distinction urged by the Petitioners. Furthermore, this argument ignores the State's vital interest in the life and health of the viable fetus. *See Maher v. Roe*, 432 U.S. 464, 478 (1977). As this Court noted in *Roe v. Wade*:

See Id., 378 U.S. at 356 ["The interpretation given the statute by the South Carolina Supreme Court..., so clearly at variance with the statutory language, has not the slightest support in prior South Carolina decisions"].

Furthermore, it is irrelevant that the unlawful neglect statute did not "enumerate" harm to a viable fetus as a specific criminal act. PET. p. 18, *quoting Bouie*. "When broad constitutional requirements have been 'made specific by... settled interpretations, willful violators 'certainly are in no position to say that they had no adequate notice that the would be visited by punishment....'" *Lanier*, *Id.*, 117 S.Ct. at 1225-26, 137 L.Ed.2d at 443. Additionally, "When a state statute has been construed to forbid identifiable conduct so that 'interpretation by [the state court] puts these words in the statute as definitely as if it had been so amended by the legislature,' claims of impermissible vagueness must be judged in that light." *Stone*, 414 U.S. at 22-23. As noted above, the previous precedents of the state supreme court gave the Petitioners ample notice that a viable fetus was a "person" and therefore a "child" under the unlawful neglect statute. Therefore, although section 20-7-50 did not proscribe fetal abuse in so many words, the application of the statute to this set of facts did not violate due process.

> With respect to the State's important and legitimate interest in potential life, the "compelling" point is at viability. This is so because the fetus then presumably has the capability of meaningful life outside the mother's womb. State regulation protective of fetal life after viability thus has both logical and biological justifications. *Id.*, 410 U.S. 113, 163-64 (1973).

The state supreme court's interpretation of section 20-7-50 is consistent with this recognition of the State's interest in protecting a viable fetus from harm. Therefore, the application of the statute is entirely consistent with prior precedents recognizing the civil rights of the unborn.

See Rose v. Locke, 423 U.S. 48, 51 (1975). Therefore, this Court should reject this ground for certiorari review.

C. The application of the statute to other conduct plainly hazardous to the health and safety of a viable fetus does not render it impermissibly vague as applied to Petitioner Whitner.

The Petitioners urge this Court to issue its writ of certiorari because *Whitner* II's construction of section 20-7-50 does not give notice of all possible parameters of criminal conduct. They assert that the statute could extend to other activities which are lawful, yet endanger the health or safety of a viable fetus. PET. pp. 22-26. They further argue that the interpretation of the statute is impermissibly vague because it gives the State unbridled discretion in determining which conduct to prosecute. PET. p. 28. These arguments do not warrant certiorari review.[17]

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[17] In an unrelated argument, the Petitioners argues that the statute itself violates due process because it defines simple negligence as the necessary mens rea for the offense. PET. pp.26-27. *See State v. Jenkins*, 278 S.C. 219, 294 S.E.2d 44 (1982) [Mens rea for violation of section 20-7-50 is simple negligence]. The Petitioners have never raised this argument as a grounds for reversing her conviction in any forum in this state, and did not argue the issue in the state supreme court. Therefore, the issue is not properly before this Court. *Raley v. Ohio*, 360 U.S. 423, 434-35 (1959).

Even if this argument was properly before this Court, it must fail. "[T]his Court has never articulated a general constitutional doctrine of mens rea." *Powell v. Texas*, 392 U.S. 514, 535 (1968). Accordingly, the process of defining the mens rea of an offense is uniquely within the province of the state legislatures. *Id.* at 536. Furthermore, this Court has emphasized that it will read a requirement

The Petitioners argue that the state supreme court's interpretation of section 20-7-50 extends to "the entire universe of a pregnant woman's behavior[,]" including their failure to obtain proper prenatal care. PET. pp. 25-26. The state supreme court expressly declined to address this "parade of horribles" of possible applications of the statute. *Whitner* II, Id., 492 S.E.2d at 782. The sole question before the state supreme court and this Court is whether the State may prosecute this defendant for harm to a viable fetus from an admittedly unlawful act - the possession and use of crack cocaine. The Petitioners' argument effectively invites this Court "to pass upon the constitutional validity of a state statute which has not yet been applied or threatened to be applied by the state courts to petitioners or others in the manner anticipated." *Webster v. Reproductive Health Services*, 492 U.S. 490, 506 (1989), *quoting Alabama State Federation of Labor v. McAdory*, 325 U.S. 450 (1945).

This Court has emphasized that "Claims based merely upon 'assumed potential invasions' of rights are not enough to warrant judicial intervention." *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 324-25 (1936). Likewise, "Determination of the scope and constitutionality of legislation in advance of its immediate adverse effect in the context of a concrete case involves too remote and abstract an inquiry for the proper exercise of the judicial function." *Int'l Longshoremen's and Warehousemen's Union v. Boyd*,

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of criminal intent in a statute only where it is silent. *Staples v. United States*, 511 U.S. 600, 605-6 (1994). Accordingly, this Court will not construe a statute to allow a prosecution for conduct without purpose or knowledge, unless the legislature implicitly or explicitly intended that result. *Id.*, 511 U.S. at 606. In this case, well before the State charged the Petitioners for harming their unborn children, they were on notice that the mens rea of the offense was simple negligence. *Jenkins*, *Id.*

347 U.S. 222, 224 (1954). This Court should not review the a hypothetical application of the statute, when the Petitioners' cases comes squarely within its parameters.[18] "[T]his Court 'is not empowered to decide... abstract propositions, or to declare, for the government of future cases, principles or rules which cannot affect the result as to the thing in issue in the case before it.'" *Webster*, 492 U.S. at 507, *quoting Tyler v. Judges of Court of Registration*, 179 U.S. 405 (1900). Therefore, this Court should not issue its writ of certiorari to review potential prosecutions that may never occur.

Furthermore, "It is well established that vagueness challenges to statutes which do not involve First Amendment freedoms must be examined in the light of the facts of the case at hand." *United States v. Mazurie*, 419 U.S. 544, 550 (1975). In this case, the Petitioners pled guilty and thereby admitted that they harmed their children when they used crack cocaine during their pregnancies. As noted above, the voluntariness of the guilty plea is not an issue before this Court. Therefore, the Petitioners lack standing to raise this argument. "[O]ne who has received fair warning of the criminality of his own conduct from the statute in question is [not] entitled to attack it because the language would not

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[18] Petitioner Whitner and potential amici dispute whether prenatal exposure to crack cocaine harms the developing or viable fetus. *See* PET. p. 20, n. 19. As the state supreme court noted, "Although the precise effects of maternal crack use during pregnancy are somewhat unclear, it is well documented and within the realm of public knowledge that such use can cause serious harm to the viable unborn child." *Whitner* II, *Id.*, 492 S.E.2d at 782 (citing medical authorities). Additionally, Petitioner Whitner's argument concerns causation and the State's burden of proof in a prosecution, not whether the State can prosecute her for unlawful neglect based upon admittedly illegal conduct. In any event, Petitioner Whitner pled guilty, and thereby waived any challenge to the sufficiency of the State's evidence.

give similar fair warning with respect to other conduct which might be within its broad and literal ambit." *Parker v. Levy*,417 U.S. 733, 756 (1974). Accordingly, **"One to whose conduct a statute clearly applies may not successfully challenge it for vagueness."** (Emphasis added). *Id.*

Finally, if other conduct harmful to the viable fetus comes within the ambit of section 20-7-50, there is no constitutional barrier to prosecutions for that conduct. *Roe v. Wade* clearly recognized the State's undeniable interest in protecting the health and safety of a viable fetus as a potential life in being. The requirement that the State prove each element of the offense beyond a reasonable doubt avoids any possible danger that a woman would be convicted for arguably innocent conduct. Under the facts of this case, nothing should prevent the State from prosecuting when a child is born suffering from drug withdrawal symptoms and the mother admits to using drugs during her pregnancy.

Under *Whitner* II, the burden falls squarely on the State to prove that the fetus was viable. Section 20-7-50 further requires proof of willful conduct or negligence, which contemplates a showing that the actor's conduct or omission was unreasonable.[19] This requirement also imposes the burden upon the State to prove that the potential harm to the viable fetus was foreseeable. *See Boyleston v. Southern Railway Co.*, 211 S.C. 232, 44 S.E.2d 537 (1947) ["Negligence carries with it liability for consequences which, in the light of attendant circumstances, could reasonably have been anticipated by a prudent man, but not for injuries which, though possible, were wholly improbable"].

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[19] As a corollary to this requirement, the State must also prove that the mother knew or should have known that her fetus was viable at the time she exposed him or her to dangerous drugs.

Furthermore, the refusal to provide care must be legally inexcusable.[20]

Lastly, since the statute only punishes conduct for which the viable fetus "is endangered or likely to be endangered," the State must prove that the defendant's conduct was the proximate cause of any injuries. "The questions of causation, reasonable certainty, etc., which will arise in these cases are no different, in kind, from the ones which have arisen in thousands of other negligence cases decided in this State, in the past." *Hall*, 236 S.C. at 262, 113 S.E.2d at 793. Accordingly, the State's burden of proving negligence, proximate causation and harm to the fetus beyond a reasonable doubt minimizes the danger that a mother would be unjustly convicted. This Court should not grant the Petitioners' request for certiorari review of this issue.

D. Petitioner Crawley's failure to timely raise her federal constitutional claims has defaulted these issues for certiorari review in this Court.

Petitioner Crawley contends that she included her petition for writ of certiorari with Petitioner Whitner's case "because the two judgments raise identical questions...." PET. p. 1, n. 1. This contention is factually and legally incorrect because Petitioner Crawley defaulted any federal constitutional claims in the Supreme Court of South Carolina.

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[20] This requirement minimizes the danger of prosecution of pregnant women who undergo life saving medical treatment that may harm the viable fetus, such as chemotherapy.

"This Court will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment." *Coleman v. Thompson*, 501 U.S. 722, 729 (1991). This rule applies regardless of whether the state law ground is procedural or substantive. *Id.*, 501 U.S. at 729. Conversely, this Court lacks jurisdiction to consider a federal constitutional claim where the petitioner did not preserve or properly present the issue in the state court. *Wainwright v. Sikes*, 433 U.S. 72 (1977); *Teague v. Lane*, 489 U.S. 288 (1989); *Coleman*, 501 U.S. at 729-30.

As shown above, Petitioner Crawley's state habeas case only addressed the subject matter jurisdiction of the sentencing court. She claimed that section 20-7-50 did not apply to the conduct for which she pleaded guilty. The order vacating Petitioner Crawley's conviction only addresses the jurisdiction of the circuit court. None of the constitutional claims addressed in the present petition for writ of certiorari were raised, argued or ruled upon in Petitioner Crawley's state habeas proceeding. Accordingly, under South Carolina law, even if Petitioner Crawley attempted to raise these issues on direct review, she did not preserve her claims for consideration by the state supreme court. *See Evans v. Manning*, 217 S.C. 10, 59 S.E.2d 341, *cert. denied* 340 U.S. 851 (1950).[21]

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[21] In *Evans*, the petitioner received habeas corpus relief on the ground that the governor granted him a "leave of absence." On direct appeal, the petitioner raised an additional sustaining ground for habeas corpus relief. In reversing the order granting relief, the South Carolina Supreme Court refused to consider the additional sustaining ground "since it was not raised in the lower court." 217 S.C. at 16, 59 S.E.2d at 343.

This Court lacks jurisdiction to consider Petitioner Crawley's arguments unless the state supreme court's judgment appeared "to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion...." *Michigan v. Long*, 463 U.S. 1032, 1040-41 (1983). In this case, Judge Eppes' order states that Petitioner Crawley alleged her conviction was "in violation of the due process clause...." However, the order granting state habeas relief eliminated any possible ambiguity when Judge Eppes stated that "The **sole question** for the court is whether the petitioner pled guilty to a crime that does not exist in South Carolina." (Emphasis added). Accordingly, the order plainly rests upon state law grounds concerning the jurisdiction of the trial court.

Since Petitioner Crawley did not raise any federal constitutional claims in her state habeas petition, those issues were not properly before the state supreme court. *Evans*, *Id.* The memorandum opinion reinstating the convictions does not expressly state that the state supreme court considered the federal constitutional claims; it simply cites *Whitner* II and the statute. However, this Court should not presume that the state supreme court considered the merits of the federal constitutional issues or declined to apply its procedural bar.

Even without a plain statement that the state supreme court relied upon state law grounds or procedural default in its judgment, there is no presumption that it considered the claims raised in the present petition. *Cf. Ylst v. Nunnamaker*, 501 U.S. 797 (1991) [Where last reasoned opinion rested on or was interwoven with federal law, federal court will presume that subsequent unexplained order did not invoke procedural bar]. Both *Whitner* I and II addressed the state law jurisdictional issue which supported

the relief in Petitioner Crawley's habeas case. As noted above, the State expressly relied upon the Petitioner's procedural default in addressing her federal constitutional claims in the state supreme court. Accordingly, based upon Petitioner Crawley's procedural default, the state court could reverse the order granting collateral relief on state law grounds without reaching the merits of her federal constitutional claims. Therefore, this Court should not grant certiorari review on the dubious assumption that the state court considered the arguments in the present petition. As this Court has noted,

> In those cases in which it does not fairly appear that the state court rested its decision primarily on federal grounds, it is simply not true that the "most reasonable explanation" is that the state judgment rested on federal grounds. (c.o.). Yet [petitioner] would have the federal courts apply a conclusive presumption of no independent and adequate state grounds in every case in which a state prisoner presented his federal claims to a state court, regardless of whether it fairly appears that the state court addressed those claims. We cannot accept such a rule, for it would greatly and unacceptably expand the risk that federal courts will review the federal claims of prisoners in custody pursuant to judgments resting on independent and adequate state grounds. *Coleman*, 501 U.S. at 737-38.

Since Petitioner Crawley has not preserved her federal constitutional claims, and the judgment below rests upon adequate and independent state law grounds, this Court lacks subject matter jurisdiction to review her case. *Michigan v. Long*, *Id.*; *Coleman*, *Id.* Therefore, this Court

should dismiss Petitioner Crawley as a party to this petition for writ of certiorari.

CONCLUSION

For all of the foregoing reasons, this Court should decline discretionary review in this case.

Respectfully submitted,

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